Office-Supreme Court, U.S.
FILED
FEB 12 1962
JOHN F. DAVIS, CLERK

No. 369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES I. WOOD, *Petitioner*

v.

STATE OF GEORGIA, *Respondent*

On Writ of Certiorari to the Court of Appeals of Georgia

BRIEF FOR THE PETITIONER

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I. OPINION BELOW

The opinion of the Court of Appeals of Georgia (R. 50-74) is reported at 103 Ga. App. 305, 119 S.E. 2nd 261.

II. JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on February 23, 1961 (R. 74-75) and rehearing was denied on March 10, 1961 (R. 75).

The Supreme Court of Georgia denied certiorari on May 22, 1961 (R. 75) and denied reconsideration thereof on June 8, 1961 (R. 78).

On August 30, 1961 petition for writ of certiorari was filed in the Supreme Court of the United States and certiorari was granted November 6, 1961 (R. 79).

The jurisdiction of this court rests on 28 U.S.C. 1257 (3), because in this case petitioner specially set up and claimed rights, privileges, and immunities under the Constitution of the United States.

III. QUESTIONS PRESENTED

In view of the freedom of speech and press, and the right to due process, guaranteed by the First and Fourteenth Amendments to the Constitution of the United States:

1. May conduct that has a tendency to obstruct a grand jury, but does not in fact do so, be punished as a contempt of court?

2. May truthful statements critical of a court be punished as contempt of the court?

3. If a county judge uses the form of a special charge to a grand jury to make an inflammatory, prejudicial, and derogatory attack on Negro voters in all news media, may a county sheriff be imprisoned for contempt because of his public criticism of the judge's act?

4. May state courts apply the doctrine of "scandalizing the court" to hold in contempt one who publishes criticism of a state court's act?

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. STATEMENT OF CASE

In the midst of a local political campaign (R. 38), on June 6, 1960, a state court judge made a "special charge" to a county grand jury. This "charge" was delivered before reporters for all local news media and all news media had been notified to have reporters present in the court room at that time (R. 40). The judge stated that 80 to 85 per cent of Negroes were "bloc voting", that colored voters did not do their own "thinking and evaluating", that money spent for newspaper advertisements, radio announcements, etc., in solicitation of "the Negro vote" actually amounted to a purchase of such votes, and that the election laws of the State were being violated. The "charge" as a whole clearly implied that any public official who received "a Negro Bloc vote" did so through "unfair, corrupt or unlawful practices" (R. 6-12).

The next day the sheriff of the county, petitioner herein, gave to local news media a news release which criticized the judge's action and warned that such

action threatened political intimidation and persecution of Negro voters in the county under the guise of law enforcement (R. 12-13).

One month later petitioner was cited for contempt of court because he had issued the news release (R. 4-13).

The following day, July 7, 1960, petitioner released a public statement saying that his defense would be that he had spoken the truth, that he had a right to speak the truth, and reiterated the truth of what he had previously stated (R. 19-20).

The proceedings for contempt was amended to charge that this last public statement of the petitioner was an additional count of contempt of court (R. 14-20).

The contempt proceedings were later further amended to charge that petitioner's statements were each "in and of itself" a contempt of court (R. 42-44).

On hearing before the trial judge, no evidence whatsoever was introduced to show that the publications of petitioner resulted in any actual interference or obstruction of the court or grand jury. A short statement of a few circumstances existing at the time the statements were published is contained in a stipulation of facts entered in the case (R. 45-46).

The gravamen of the contempt citation as twice amended, and the gravamen of the state's case against petitioner, was that the simple publishing of petitioner's news release and defense statement, in and of itself was a contempt of court and in and of itself was clear and present danger to the administration of justice (R. 43-44).

In the court of first instance, petitioner, by general demurrers to the contempt citation, did specially set up and claimed his rights, privileges, and immunities under the Constitution of the United States and set forth verbatim the provisions of the First Amendment thereof guaranteeing his freedom of speech and the provisions of the Fourteenth Amendment thereof guaranteeing his constitutional rights against state action (R. 23-27, 31-34). Also in the written response of petitioner to citation, petitioner again plead and specially set up and claimed "the liberty of speech guaranteed to him by the Fourteenth Amendment . . . and as provided in the First Amendment to the Constitution of the United States . . ." (R. 39-40).

The trial judge overruled all of petitioner's demurrers (R. 44-45) and on the facts and pleadings adjudicated that petitioner was in contempt of court on each of the counts of the citation as amended, and ordered petitioner to prison (R. 48-50).

The case went to the Court of Appeals of Georgia on writ of error, in which appellate court petitioner by Bill of Exceptions assigned error on the judgment overruling his demurrers and on the judgment adjudicating him in contempt of court (R. 1-2).

The Court of Appeals of Georgia affirmed the judgment of the lower court as to Count 1 (petitioner's news release) and as to Count 3 (petitioner's defense statement), but reversed the judgment of the lower court as to Count 2 of the contempt citation (involving an "open letter" published by petitioner). (R. 74-75).[1]

[1] The original proceedings contained a "Count 2" which made almost identical contempt charges against an "open letter" (R. 17). Petitioner did not seek review on certiorari of the judgment of the lower court reversing his conviction on Count 2, and the respondent filed no request for review.

The Supreme Court of Georgia denied certiorari (R. 75) and denied reconsideration thereof on June 8, 1961 (R. 78).

On August 30, 1961 petition for writ of certiorari was filed in the Supreme Court of the United States and certiorari was granted November 6, 1961 (R. 79).

VI. SUMMARY OF ARGUMENT

(1) In the case now before the court, the fundamental issue is between the reasoning of the doctrine of "scandalizing the court" and the principle of the right to speak the truth.

The Court of Appeals of Georgia reasons that a judge can not be accused of wrongdoing because a judge represents the institution of judgeship and the welfare of society demands that freedom of speech, or publication of the truth, must be subordinated to respect for the *sanctity* of court. A judge should not be "dragged in the mire" with freedom of speech about actual wrongdoing by the judge, since such causes disrespect for the high office which the judge seeks to personify (R. 63, 64).

These contentions are in full accord with the doctrine of "scandalizing the court", but are directly contrary to the rights of citizens of this country under the First and Fourteenth Amendments as held in the decisions of the Supreme Court of the United States in the cases of *Bridges* v. *California*, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946); *Craig* v. *Harney*, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947); and *Cammer* v. *United States*, 350 U.S. 399, 76 S. Ct. 456, 100 L. Ed. 474 (1956).

(2) This case also presents the rare incident of a county judge using the form of a special charge to a grand jury to make an inflammatory, prejudicial, and derogatory attack in all news media on the voters of a minority race group (R. 6-12).

When the power of contempt is used to silence any opposition or criticism of the judge's act, there is raised not only the question of a citizen's right to speak the truth, but also the question of whether the judge's action is in fact a judicial act or is a gross abuse of judicial prerogative which should not form a base to support contempt proceedings.

This issue has never been determined by the Supreme Court of the United States. As a matter of principle it is urged that punishment by contempt, or otherwise, should not flow from a charge which is manifestly an abuse of judicial prerogative. *Clair* v. *Nebraska*, 40 Neb. 534, 59 N. W. 118, 28 L.R.A. 367 (1894); *Blau* v. *State*, 82 Miss. 514, 34 S. 153 (1903); *State* v. *Nunez*, 147 La. 394, 85 S. 52 (1920).

VII. ARGUMENT

(1) The Right to Speak the Truth

In this case, petitioner sought to speak the truth concerning a judge's act, and sought to warn the public of the consequences which would actually result from the judge's action.

The power of contempt was used to prevent any contention or proof, of the truth of petitioner's publications, either in public news media or in a hearing on contempt charges. The Court below held that the truth or falsity of the statements concerning the judge were irrelevant to the question of contempt (R. 67), and that

while a corrupt or incompetent judge might be subject to impeachment or defeat at the polls, he was not subject to criticism, even if the statements were truthful (R. 63). Thus the Court below said (at R. 63) as the principle basis of its decision:

> "The structure of our government demands that freedom of speech be subordinated to the welfare of society in the respect for the integrity and sanctity of our courts . . . If a judge is corrupt or incompetent, there may be a remedy by suit, prosecution, impeachment, or at the polls. The public policy of democracy is that the judiciary shall not be dragged in the mire because of a real or a supposed wrong."

How one goes about impeaching or defeating a judge at the polls without criticizing him is not explained.

The record clearly shows that two things happened when the accused stated publicly that truth would be his defense to the contempt charge.

First, the contempt proceedings were amended to charge that even a statement contending publicly that he spoke the truth was a contempt of court (R. 15-20). As a result of which the accused and his witnesses dare not, under certainty of conviction for direct contempt, appear in the actual presence of the judge to plead or prove the truth of petitioner's statements.

Secondly, the contempt proceedings were amended to charge that petitioner's statements were each "in and of itself" a contempt of court (R. 42-44). Thus truth became irrelevant. Truth became no defense. The sole question to be determined by the criticized judge was the admitted authorship of petitioner's publications.

The Court of Appeals of Georgia in its opinion in this case agreed that truth is irrevelant (R. 51, 67) apparently by a conclusive legal presumption that petitioner's statements were "an attempt to obstruct or impair the administration of justice" (R. 51, 65).

However, at the contempt hearing, no evidence whatsoever was introduced to show that the publications of petitioner resulted in any actual interference or obstruction of the court or grand jury in any manner. No proof of actual resulting danger to the court or grand jury was necessary under the opinion of the lower court in this case and no defense was possible. This was in direct opposition to the holdings of this Court on the constitutional right of free speech and freedom of the press *vis a vis* contempt of court. In *Pennekamp* v. *Florida*, 328 U.S. 331, this Court said (at p. 347) that the principle of freedom of comment should weigh heavily against a possible tendency to influence cases, and (at p. 348) that criticism of judges concerning cases pending on trial was not likely to affect the administration of justice. At the time of the criticism involved here, no case was pending on trial, and certainly no case before a jury.

And in *Bridges* v. *California*, 314 U.S. 252, this Court held that an "inherent tendency" or a "reasonable tendency" of a statement to impede the administration of justice was not such a "clear and present danger" to the administration of justice as to warrant a curtailment of the rights of freedom of speech or freedom of the press. At p. 273. And in *Pennekamp* v. *Florida* this Court held that the clear and present danger to judicial administration must be shown by solid evidence. At p. 347. And in the *Bridges* case this Court held that to establish a clear and present

danger the prosecution must show at least that the evil result is likely, would be extremely serious, and the degree of its imminence extremely high. At p. 263. Yet in this case the Court below held whether or not the conduct interfered with the administration of justice was irrelevant (R. 64, 67), that if it had a tendency to obstruct the grand jury that would be enough to constitute contempt (R. 63), and that criticism of a judge which "could have had the effect" of interfering with or diverting the grand jury may properly be found to constitute contempt (R. 51). Thus in flat contradiction of this Court, the Court below held that statements critical of a judge, even if true, that possibly ("could have had the effect") could divert the grand jury, in and of itself constituted contempt, or in effect, that the mere possibility of a statement diverting a grand jury in and of itself was a sufficiently clear and present danger to warrant curtailment of the rights of freedom of speech and freedom of the press. This cannot be reconciled with *Bridges* v. *California*.

The Court of Appeals of Georgia, in unequivocal terms, gives as the basis for its opinion, that a judge can not be accused of wrongdoing because a judge represents the institution of judgeship and the welfare of society demands that freedom of speech, or publication of the truth, must be subordinated to respect for the sanctity of court. A judge should not be "dragged in the mire" with freedom of speech about actual wrongdoing by the judge, since such causes disrespect for the high office which the judge seeks to personify (R. 63, 64). Of course the same result of judicial immunity from criticism is reached if a court may declare the contents of a newspaper article,

from its language alone, to be "sufficient to amount to an obstruction of the administration of justice" (R. 71).

In affirming the contempt charge for the involved publications, the Court of Appeals of Georgia applied the subjective tests of "tendency" (R. 50) and a "could have had the effect of" possibility test (R. 51). Likewise, in effect as a conclusion of law, the lower court holds that petitioner's statements, from their language alone, were "an attempt to obstruct" (R. 51) and that petitioner "endeavors to interfere" (R. 50, 65).

The objective test of "clear and present danger" established by the Supreme Court of the United States in *Bridges* v. *California*, 314 U.S. 252, should not be circumvented on the grounds that the inherent power of state constitutional courts to define and punish for contempt means "the question of whether the conduct complained of interfered with the administration of justice in a pending case is not involved" (R. 64).

The freedom of speech and press provisions of the First Amendment to the Constitution of the United States prohibits to courts of this country the power of King's courts to lay by the heels one who scandalizes the court in publications outside the presence of the court. *Bridges* v. *California*, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946); *Craig* v. *Harney*, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947); *Cammer* v. *United States*, 350 U.S. 399, 76 S. Ct. 456; 100 L. Ed. 474 (1956).

And the Fourteenth Amendment to the Constitution of the United States prohibits state action which

denies constitutional rights of citizens of the United States. *Gosjean* v. *American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); *Hague* v. *C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1432 (1939); *Schneider* v. *State*, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Kingsley International Pictures Corp.* v. *Regents of University of N. Y.*, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2nd 1512 (1959).

Not truly germane to the questions for review is the facts that petitioner as sheriff of the county was by law an officer of court. The only relevant evidence in this case, petitioner's sworn testimony in his response, is uncontradicted and undisputed on the point that the publications were not a part of any official capacity or transaction as an officer of court (R. 38). But the Court below held that the fact that petitioner happened to be an official was relevant to whether his statements constituted contempt (R. 69, 70).

The decisions of this court would indicate that a citizen of the United States does not lose his constitutional rights of freedom of speech and press simply because at some times and for some purposes he serves as an officer of a court, particularly where the statements made were not a part of any transaction or service as a court officer. *Cammer* v. *United States*, 350 U.S. 399; In re *Harriett Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2nd 1473 (1959).

In the case now before the court, the fundamental issue is between the reasoning of the doctrine of "scandalizing the court" and the principle of the right to speak the truth.

If the judiciary can not be criticized, if truth of publications is irrelevant, if reality is to be ignored

and publications are to be judged for contempt on the basis of their language alone, then the citizens of our country will have lost a significant portion of that freedom of speech which so distinguishes our constitutional government from nations where their subjects dare not criticize authority.

(2) An Inflammatory and Prejudicial Charge as the Basis for Contempt Proceedings

There is a scarcity of recorded cases dealing with an inflammatory and prejudicial charge to a grand jury. This is both a tribute to the American judiciary and is perhaps also an indication of the obvious impropriety of such an act.

In the opinion of the Court of Appeals of Georgia the "special charge" involved in this case showed that the judges of the trial court "proceeded within the ideals and the letter of the law" (R. 70). With all due respect to the lower courts, argument to the contrary must be presented.

A community can be inflamed by racial rumors and accusations. The menace and degradation of a minority race group can be contended. The specter of an evil and corrupt "negro bloc vote" can be raised.

But should such activities be classed as a judicial act because done in the form of a special charge to a grand jury? The respectability of judicial pronouncement and recital vastly increases the drastic effect and unfortunate consequences of such an act.

Couple a claim of unlimited power to use the charge prerogative with a claim of unlimited power to define contempt for public criticism, and any judge, even one who might be devoted to racism, has an unlimited

control and censorship over the public opinion in a community.

Legal contention that a judge has unlimited power to use, or abuse, the prerogative of charging a grand jury would appear to be without a foundation in reason or necessity.

As a matter of principle it is urged that punishment by contempt, or otherwise, should not flow from a charge which is manifestly an abuse of judicial prerogative. *Clair* v. *Nebraska*, 40 Neb. 534, 59 N.W. 118, 28 L.R.A. 367 (1894); *Blau* v. *State*, 82 Miss. 514, 34 S. 153 (1903); *State* v. *Nunez*, 147 La. 394, 85 S. 52 (1920).

VIII. CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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